

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Application No. 14258 of the Embassy of the People's Republic of Benin, pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 3101.47 to erect a thirty-eight foot antenna tower in an R-3 District at premises 2737 Cathedral Avenue, N.W., (Square 2106, Lot 801).

HEARING DATES: February 12, April 24 and May 1, 1985  
DECISION DATE: June 6, 1985

FINDINGS OF FACT:

1. The application was originally scheduled for the public hearing of February 27, 1985. At that hearing counsel for the applicant requested a continuance in order that the applicant might have the assistance of the U.S. Department of State in resolving certain legal and technical questions that had arisen subsequent to the filing of the application. There was no opposition to the request for continuance on the part of Advisory Neighborhood Commission (ANC) 3C, the Woodley Park Community Association (WPCA), and counsel for neighbors in the subject area. A representative of the State Department concurred that the Department needed further time and that it originated the request for the continuance. The Board continued the hearing to April 24, 1985.

2. The Chairperson ruled to grant party status to the U.S. Department of State and the WPCA in the subject application.

3. The subject site is located on the north side of Cathedral Avenue between Connecticut Avenue to the east and 28th Street to the west, and is known as premises 2737 Cathedral Avenue, N.W. The site is located in an R-3 District.

4. The site consists of an 11,302 square foot lot which has 67.79 feet of frontage on Cathedral Avenue and 86.33 feet of frontage on a fifteen foot wide public alley to the rear.

5. The site is developed with a two story detached building. There is a driveway which runs along the west side of the site to a garage building in the rear of the site.

6. North of the site is a fifteen foot wide public alley. Beyond the alley is an Exxon gasoline station and commercial parking lot and garage in the R-5-B District. Beyond the gasoline station are an electric transformer station and apartment buildings. To the east of the site is a vacant lot of 7,974 square feet in the R-3 District. It is used as neighborhood garden plots. To the south of the site, across Cathedral Avenue, are single family residences in the R-3 and R-5-B Districts. To the west of the site is a single family detached dwelling in the R-3 District.

7. The subject property is utilized by the Embassy of the People's Republic of Benin as a chancery. No change in the existing use is requested.

8. The applicant seeks to erect a radio antenna tower for use in conjunction with the installation and operation of radio equipment at the chancery for diplomatic use. Pursuant to the Foreign Missions Act, the Embassy requested authorization from the Department of State, which on June 8, 1984, authorized the installation and operation of a low-power radio station at the chancery and the use of certain transmitting frequencies for the transmission of the Embassy's official messages to points outside the United States. In order to utilize the radio equipment, an antenna is required for the transmission and reception of messages between the Embassy and the central radio station of the Government of the People's Republic of Benin at Cotonou, which is located on the west coast of Africa.

9. Paragraph 3101.47 permits through a special exception an antenna tower for television and frequency modulation broadcasting to any height and in conjunction therewith the erection, alteration, or use of buildings for transmission or reception equipment, provided that:

- A. The proposed location and height will not affect adversely the use of neighboring property in accordance with the Zoning Regulations;
- B. Any part of an antenna tower is removed from all lot lines a distance of at least one-sixth of its height or is separated from other property by an intervening street;
- C. The proposed height of the tower is reasonably necessary to render satisfactory service to all parts of its service area;
- D. Any transmission equipment located in a Residence District must be located in such district for technically satisfactory and reasonably economical transmission;

- E. Before taking final action on an application for such use, the Board shall have submitted the application to the District of Columbia Office of Planning for review and report; and
- F. Any height of a tower in excess of that permitted by the Act of June 1, 1910 (36 Stat. 452), as amended, must be approved by the Mayor of the District of Columbia.

10. The height of the proposed antenna tower, thirty-eight feet, is less than the maximum height permitted for structures in an R-3 District, which is forty feet.

11. The proposed antenna tower is a vertical aluminum tower in the shape of an equilateral triangle approximately twelve inches wide on each side. The tower is to be mounted by anchor bolts set in a concrete base in the rear yard of the chancery premises. The tower would be located approximately thirty feet from the north lot line of the property, twenty-one feet from the east lot line, 112 feet from the south lot line, and forty feet from the west lot line.

12. The antenna tower is a vertical support or mast which raises the antenna to its operational height and serves no other purpose than for height. The antenna, to be placed on top of the tower, is a separate object which is the actual transmitter of the radio signal.

13. The antenna tower is supported by guy wires which are attached to anchor rods embedded in the three concrete bases or anchor blocks, extending six feet below grade. The purpose of the guy wires and anchor blocks is to give stability to the antenna tower, to keep it vertical.

14. The proposed antenna and tower do not rotate or move and do not generate any noise.

15. No portion of the antenna, antenna tower, or foundation and support system for the tower will intrude into or over any neighboring property.

16. One of the tower anchor blocks to which the guy wires for the tower would be attached is presently located about two feet from the northeast corner of the Embassy property. The anchor block is not physically part of the tower structure. The block is put in the ground to help support the tower. The point at which the tower is attached is about seven feet from the property line. The anchor block could be covered so as to be completely below grade, or it could be moved further away from the property line.

17. The tower will be sited in the northeast area of the rear yard of the site. The grade level at this point is

higher than the rest of the site, which rises in elevation from Cathedral Avenue to the north.

18. The foundation and anchor system for the antenna tower are more than adequate in terms of structural safety. The antenna and tower are designed to withstand greater wind loads than required for buildings in the District of Columbia. Nothing would happen if an individual touched the tower while the antenna was in operation. If an individual climbed the tower and touched the antenna, he or she would receive a burn similar to that of touching a hot frying pan. There would be no electrical shock.

19. The Embassy has proposed to erect a six foot brick and iron fence around the premises which it argued would serve to deter the children of the neighborhood, or those attending the Maret School, located two blocks from the subject site, from climbing the tower. The steps on the side of the tower could also be removed to discourage climbing, but would not prevent climbing.

20. The size, design and appearance of the antenna and tower are determined by their function. The Granger 2004 antenna and tower proposed by applicant is the smaller of the two models of antennas and towers used most often by embassies in the District of Columbia.

21. It is not possible to mount the antenna on the roof of the chancery building at 2737 Cathedral Avenue. The building contains no steel or concrete. It is constructed of wood and is eighty-five years old.

22. The thirty-eight foot antenna tower will be only partially screened from view from Cathedral Avenue by the existing thirty-six foot chancery building and by existing trees. There are existing trees on other boundaries of the Embassy's property, which will also only partially screen the antenna tower from view. At the request of the ANC, the Embassy proposed to provide landscaping by the planting of additional trees, foliage, and grass.

23. The proposed thirty-eight foot height of the antenna tower is necessary because it is the minimum required for the antenna to operate properly.

24. A representative of the State Department testified that experts in the Office of Communications of the State Department who are familiar with high frequency radio transmission by embassies conducted an independent study of the Benin proposal and concluded that it was reasonable, and that the thirty-eight foot height of the tower was the minimum height possible.

25. The applicant argued that it is essential to governments to have communications with their foreign embassies which are totally within the embassies' control and do not depend on the cooperation, assistance or good will of the host country or on local commercial communications facilities. The United States Government considers rapid and reliable communications with its foreign embassies to be essential to the conduct of diplomacy and to the national security of the United State.

26. The applicant argued that the radio transmission equipment, antenna and tower proposed by the Embassy of Benin constitute a means of independent communications which would be in the Embassy's control and not dependent on the host government. For the Embassy of Benin to maintain radio communications with the radio system in its country, an antenna mast and an antenna array of the type proposed will be necessary. The State Department testified that its experts in the Office of Communications knew of no way to overcome the requirements of height and size. The State Department experts looked at other alternatives, none of which were feasible.

27. The applicant argued that the location of radio transmission equipment or the antenna tower at a remote location, to be operated by telephone or radio hook-up, is not technically satisfactory because the Embassy would not have control over the operation of the radio. The location of radio transmission equipment or the antenna tower at a remote location, to be operated by radio, is not technically possible because the radio link would require utilization of a portion of the radio spectrum not authorized for embassy use.

28. It is not technically feasible or reasonably economical for the Embassy of Benin to utilize a satellite dish instead of the proposed antenna and tower.

29. The Embassy does not own other property in the District of Columbia. It is not technically feasible or reasonably economical for the Embassy to purchase or lease other commercial property for purposes of constructing an antenna, because the Embassy must have sole control of the communications system, which it can only do if all the equipment is on its property.

30. The National Telecommunications and Information Administration of the Department of Commerce (NTIA) is responsible on behalf of the President for authorizing, upon the recommendation of the Department of State and after consultation with the Attorney General and the Federal Communications Commission (FCC), the construction and operation of a low power radio station and the fixed service for a foreign government embassy or legation.

31. The NTIA has authorized for use by the Embassy of Benin a radio station operating in the high frequency portion of the radio frequency spectrum with powers up to one kilowatt.

32. The State Department reported that the NTIA, by its own standards, does not grant such authorization unless it is understood that the authorization is conditioned upon non-interference with other users. The NTIA authorization in this case explicitly states that the grant of authority to the Embassy of Benin is conditioned upon non-interference with other users.

33. The NTIA has authorized twenty-four licenses for similar radio stations operated by other embassies in the District of Columbia at approximately the same power, frequency range and other characteristics as the Embassy of Benin.

34. Evidence was submitted that the NTIA has never received a complaint with respect to interference to commercial radio and television reception caused by any of the existing twenty-four embassy stations that has proven valid upon examination.

35. The State Department reported that with respect to safety, the Federal government has not established any standards for exposure to non-ionizing radiation and there is no evidence in the possession of the Department of State nor of any other Federal agency consulted to indicate that there is any problem with exposure to non-ionizing radiation from high frequency radio frequency emissions.

36. The NTIA has reviewed the proposed Embassy of Benin antenna specifications as to power, frequency, etc., and has calculated that the level of non-ionizing radio frequency radiation at a distance of thirty or more feet in the direction of maximum radiation from the antenna would be within the existing radiation protection guide of the American National Standards Institute. In any other direction, the levels would be substantially lower.

37. The Office of Planning (OP), by report dated February 20, 1985, recommended that the application be approved with certain conditions. The OP reported that the requirements of Paragraph 3101.47 were geared to the protection of neighboring properties from visual and operational impacts. The OP recommendation was conditioned upon the following:

- A. The applicant demonstrate to the Board that the proposed height of the tower is not in excess of that needed to service the needs of the applicant;

- B. The applicant demonstrate to the Board that the proposed antenna will not cause interference with the signal reception in the neighborhood; and
- C. The applicant submit a landscape plan showing what measures are proposed to minimize the visual affects of the tower on nearby properties.

38. The OP, in a supplemental report dated April 7, 1985, reported that it had considered new information received from the Department of State which indicated the Department's preliminary evaluation of the proposed tower would have a negligible effect on the normal operation of electronic equipment in the neighborhood. The OP had received information from the WPCA which is contrary to that preliminary finding. The OP was of the opinion that the alleged adverse electronic interference on neighboring properties should be evaluated by the NTIA, since it is the agency responsible to rule on these matters. Furthermore, the findings of the NTIA should be made available to the Board of Zoning Adjustment. This would assist the Board's deliberation regarding optional methods which could accomplish the same objectives as those proposed by the applicant while minimizing, if not eliminating, the negative aesthetic intrusion of this antenna which is alien to the residential character of the surrounding neighborhood.

39. The OP could not support the special exception request, as it was not shown that there are no other technologically acceptable alternatives to the tower which would negate the need for the visually obtrusive tower. The OP recommended that the Department of State present testimony to the Board describing how other foreign governments handle their communication needs. In addition, the Department of State's report should include the NTIA's finding as specifically related to the subject application, indicating alternative means of achieving the applicant's communication goals.

40. For the reasons discussed below, the Board does not concur with the reasoning of the OP.

41. Advisory Neighborhood Commission 3C filed two recommendations on the application, one dated January 28, 1985, and one dated March 25, 1985. In the resolution dated January 28, 1985, the ANC recommended as follows:

- A. That the application be denied unless adequate technical evidence is presented to the BZA establishing that:
  - 1. The proposed height and other dimensions of the proposed structure are necessary for the

proposed purpose and that a shorter, less obtrusive structure would not suffice; and

2. Alternatives, such as a roof-top mounted antenna or satellite dish, are not available; and

- B. If the technical evidence is presented to substantiate need for the specifications of the structure as proposed, granting the application should be conditioned upon the restoration of adequate landscaping to improve the appearance of the premises and to screen the antenna as much as possible.

42. In its resolution of March 25, 1985, the ANC reported that since January 28, the ANC had learned that the Benin Chancery is a nonconforming use permitted only because the chancery occupied the site before the Foreign Missions Act took effect, but which nonconforming use may not expand. The ANC further reported that after January 28, more neighbors learned of the BZA application. Over sixty of the neighbors most proximate to the chancery had signed a petition objecting to the proposed radio tower and antenna. These neighbors expressed their concerns to the ANC about danger to the public health and safety due to radio waves and the emergency generator, about instability of the tower, about interference with their radio and television reception on account of potentially improper maintenance, which they anticipated because the property is not well maintained, and about the visual intrusion of a radio tower and antenna in their residential neighborhood and its effect on property values. There was also concern whether the Embassy had obtained permission to install a new emergency generator in its radio room. The ANC resolved that the subject application be denied for the following reasons:

- A. The installation and operation of a thirty-eight foot tower with a radio antenna extending forty-four feet across is an impermissible expansion of chancery use, particularly when coupled with the previously approved conversion of the Embassy's garage into a radio room, and the possible impermissible addition of an emergency generator in the radio room.
- B. Such an antenna and tower are clearly incompatible with R-3 residential use, posing a potential hazard to public health and safety, the neighbors' quiet enjoyment of their homes and environment, and property values.

43. The Board is required by statute to give "great weight" to the issues and concerns of the ANC that are



reduced to writing. For the reasons discussed below, the Board concurs on the issues of adverse affects on the use of neighboring properties. The Board does not concur with the ANC on the issues of expansion of the chancery and health and safety. The Board finds that the latter issues are not dispositive of the application.

44. The Woodley Park Community Association (WPCA) opposed the application on the grounds that the antenna tower would adversely affect the use of neighboring property on the following grounds:

- A. The visual impact of a thirty-eight foot high, forty-four foot wide antenna tower would be detrimental to the area. The obtrusive impact of the proposed antenna would be magnified by its location on the chancery grounds which are substantially elevated above the level of Connecticut Avenue. The antenna would be clearly visible from Cathedral Avenue and would constitute an unavoidable eyesore for the residents of the apartment buildings to the east and west of the chancery. Furthermore, the residences directly west of the chancery would be especially affected as they have third floor bedroom and second floor kitchen and living room windows fronting on the proposed antenna site. In addition, these residences have second floor balconies which would be directly facing the proposed antenna. The antenna tower would be an obtrusive eyesore from all directions.
- B. Transmissions from the proposed antenna would further affect the use of neighboring property by interfering with television and radio reception, telephone calls, and with the operation of other electronic appliances including home stereos and even home security systems. Interference with the use of electronic appliances would clearly constitute an adverse effect on the rights of residential property owners. Elderly and incapacitated Woodley Park residents who remain at home during the day would be especially affected by electronic appliance interference as they rely on such appliances during the daytime hours when transmission activity would be heaviest. The applicant, who bears the burden of proof in this case, failed to make any showing that transmissions to and from the proposed antenna tower would not interfere with radio and television reception in the neighborhood or with operation of other electronic appliances including home security systems and home computers.

- C. Construction of the proposed antenna could result in health hazards to nearby residents due to prolonged close range exposure to radio transmissions. At the present time there is not enough information available to predict accurately how exposure to the radio waves emanating from the proposed antenna could effect nearby residents. Potential health hazards are a real and serious concern. Both the Environmental Protection Agency and the Federal Communications Commission are currently investigating this area. Although these investigations have not been completed, residents of Woodley Park should not be forced to act as human guinea pigs pending discovery of new information.
- D. The proposed tower constitutes an attractive nuisance that would present an additional hazard to neighborhood children who might be tempted to climb it. Many children reside in Woodley Park and the Maret School is located just two blocks from the chancery site. Moreover, the chancery is unguarded and its driveway provides easy and unimpeded access to the proposed antenna structure.
- E. The already accomplished conversion of the existing garage into a diesel generator room raises the additional question of whether the resultant noise and pollution will constitute an adverse effect. Here too, the applicant must be required to meet its burden of showing that no such consequence will result. In this context, the Board must also consider whether use of the garage as a generator room would constitute an impermissible expansion of chancery use pursuant to Paragraph 3101.3113.
- F. Due to the cumulative effects listed above, construction of the proposed antenna would undoubtedly lower property values throughout Woodley Park. The investment made in their homes represents the largest single financial asset for many Woodley Park residents. For some, it may represent their only sizable asset. The reduction in property values resulting from construction of the proposed antenna would be a taking without right and would certainly constitute an adverse effect on neighboring property.

45. The WPCA further argued that in its 1966 denial of the Government of Thailand's application to construct a radio antenna, the BZA relied in part on the finding that the applicant did not "establish conclusively that other transmission equipment could not provide satisfactory

communication." Likewise, the applicant failed to make any showing that it could not use a less objectionable alternative such as a less obtrusive antenna. The applicant's urgent need for transmitting equipment is questionable in view of the fact that the chancery has long relied on conventional mechanisms, e.g., telex and diplomatic pouch, for communication with Benin. In this context, the applicant should be required to demonstrate what steps it has taken to investigate the feasibility of obtaining less objectionable alternative equipment and why such equipment could not be used. In addition, the applicant should be required to demonstrate that it has explored alternatives such as leasing space in an office building already equipped with transmitting facilities or obtaining use of an antenna located off the chancery grounds. Use of such a remote location transmitter and antenna would appear to be an ideal compromise which would satisfy Benin's communication objectives without unnecessarily affecting use of neighboring property. Furthermore, absent a conclusive showing by Benin that it cannot use such a remote location or other alternative, it has not met its burden of showing that the proposed height of the tower is "reasonably necessary." In fact, assuming that a remote antenna location is a feasible alternative, it would be extremely difficult for the applicant to justify any antenna at 2737 Cathedral Avenue, N.W. as being reasonably necessary.

46. Eight property owners in the immediate vicinity of the subject site testified at the public hearing in opposition to the application. Two of the owners lived on 28th Street. The rear yards of their property abut the rear yard of the subject site. They testified that the applicants' rear yard had lost its natural landscaping of grass and trees. Now it was just dirt with large concrete blocks. The erection of a thirty-eight foot antenna tower would make the yard more horrendous and overpowering. In addition to this intrusion upon their homes, the owners opposed the application for the same reasons recited by the ANC and the WPCA.

47. Petitions with approximately 450 signatures of residents in the neighborhood in opposition were submitted to the record. The grounds recited in the petition were as follows:

- A. The antenna tower would disrupt television and radio reception and thereby interfere with the peaceful enjoyment of homes and property.
- B. The antenna tower would create an unsightly appearance, given its thirty-eight foot height and forty-four foot diameter, which, coupled with the destruction by the Embassy of a tree and natural landscaping, the destruction of a stucco garage

and its replacement by a tin shed, and the poor upkeep of the main building, had resulted in a generally shabby appearance of the Embassy property, all of which had adversely impacted on the residential neighborhood and its property values.

- C. The planned radio antenna would add one more nonconforming use in contravention of the residential zoning regulations, making even less likely that the property will ever be restored to its proper, residential use and continuing the disruption on an escalating scale of all of this small home, small lot and closely grouped residential neighborhood.

48. Many letters in opposition were filed in the record. The grounds were the same as already recited above.

49. The opposition's real estate expert witness testified that the existence of the subject antenna tower would decrease the value of properties in the neighborhood. The antenna tower would be seen from the driveway. The sales price of the two residences at 2903 and 2905 28th Street would be affected the most since the rear yards of those residences abut the rear yard of the subject site. With the three residences being so close together, the antenna tower would practically be in the rear yards of 2903 and 2905 28th Street. In the opinion of the witness, neither house could be sold unless there was a large discount on the price. The remainder of the immediate neighborhood would also be adversely affected since the visibility of the antenna would discourage future purchasers. The price range in the area is \$200,000 to \$300,000. Purchasers who have that amount of money to spend would go elsewhere where there is no antenna tower. An appraiser would have to deduct from the sales price because of the existence of an antenna tower on a site, because of the character that an antenna tower gives to a residential neighborhood. The Board strongly credits the testimony of the witness and concurs with his findings.

50. The WPCA's electrical engineer expert witness testified that transmissions at the power and frequencies proposed by the applicant would adversely effect electronic equipment.

51. In reply to the grounds of the opposition, the Board reiterates its finding recited in Finding No. 43.

52. No property owners testified at the public hearing in support of the application nor were there any letters of record in support of the application.

53. The Board finds that the applicant did meet its burden of showing that the proposed height and location of the tower are reasonably necessary and economical to accomplish the goal of transmissions as proposed. However, the Board finds that the question of alternative locations for the antenna on another site or alternative means of communicating between the District of Columbia and Cotonou is not dispositive of the application.

54. The Board finds that the location of the tower itself is removed from all lot lines of the lot a distance more than one-sixth of its height. The tower is distinct from the guy wire and anchor blocks, as noted in Finding No. 13. Even if the blocks were deemed to be part of the tower, the one block which is within approximately two feet of the lot line could be moved.

CONCLUSIONS OF LAW AND OPINION:

Throughout the public hearing, the applicant, the Department of State, ANC 3C and the WPCA raised certain legal issues as follows:

- A. Whether the Foreign Missions Act is applicable to this case. If so, is the question of whether the antenna constitutes an "expansion" under the Foreign Missions Act properly before the Board in this proceeding?
- B. Whether the Board is barred from approving the antenna tower because it constitutes an impermissible expansion of a chancery or a nonconforming use.
- C. Whether there is any Federal preemption of any issues relating to radio transmission and interference. If not, what relevance or weight should evidence of interference be given in determining whether the proposed antenna would adversely affect the use of neighborhood property?
- D. Whether approval of the Board is required for an antenna structure under forty feet in height.

Based upon the briefs submitted by the parties, and other documents or testimony which have been included as part of the record in this application, the Board concludes that the subject application is not a Foreign Missions Act case requiring consideration of the criteria set forth under Article 46 of the Zoning Regulations. The Board heard the application solely upon the special exception criteria of Paragraph 3101.47 and Sub-section 8207.2. The issues of whether this is a Foreign Missions Act case or an expansion of a chancery are therefore not properly before the Board.

In the letter to the Republic of Benin dated October 10, 1984, indicating that BZA approval was required for a special exception, the Zoning Administrator did not construe the applicant's request for a permit to construct the tower as a Foreign Missions Act case or as an expansion of a chancery. The basis for the Zoning Administrator's action, which has not been challenged by any party by the filing of an appeal, is that under Paragraph 3101.47 of the Zoning Regulations, an antenna tower for television or frequency modulation broadcasting to any height is permitted subject to approval by the BZA. The applicant has the same right to request a special exception as any other property owner.

The Board rejects the assertions by the opposition that the Board is barred from approving an antenna tower on the subject property by the provisions of Paragraph 3101.313. That paragraph permits an existing chancery in an R-3 District to continue, and states that "this paragraph shall not allow for the reconstruction or expansion of any existing building or structure devoted to chancery use." The applicant does not seek to exercise any rights under Paragraph 3101.313, nor is that Paragraph cited as the basis for approval of the antenna tower. Rather, the applicant seeks a special exception in the same manner as any other property owner in an R-3 District has the right to do.

The Board concludes that the subject chancery is not a nonconforming use. Under the Zoning Regulations, a nonconforming use is defined as "any use ... lawfully in existence at the time these regulations or any amendment thereto become effective, which does not conform to the use provisions for the district in which such use is located." An existing chancery is a use permitted as a matter-of-right in an R-1 District under Paragraph 3101.313, and is permitted in an R-3 District by incorporation under Paragraphs 3102.31 and 3103.31. The existing chancery of Benin is thus a conforming use.

Federal law does not preempt local regulation of foreign government radio stations in the District of Columbia. Moreover, there is no Federal preemption of the height and location of radio antennas, although the Board would be preempted from regulation of the transmission and frequency assignment of the antennas. However, insofar as the FCC, NTIA and the Department of State have on-going jurisdiction and authority to regulate the nature and extent of permissible interference by a radio transmitter, the issue of radio interference should not be considered in determining what, if any, adverse affects the antenna would have on the Woodley Park Community.

The Applicant has argued that the Communications Act of 1934, as amended preempts local regulation of foreign

government radio stations in the District of Columbia. The Board rejects this argument based upon the following:

- A. The State Department indicated that any preemption of BZA authority to regulate is limited only to those matters relating to the assignment and interference of radio transmissions. The BZA does have local zoning authority to regulate where the antenna is located.
- B. While the Republic of Benin has the right to install an antenna transmitter and has been assigned a frequency, it has no absolute right to the location of the antenna.

The issue of whether the Board should consider radio interference and Federal preemption has been somewhat confused. The Board concludes that Federal regulation of the frequency and levels of interference does not preclude or preempt the BZA from considering interference in this special exception proceeding. However, insofar as the NTIA and the State Department have the on-going obligation to address complaints of interference with the authority to make adjustments in the assignment or require that any improper interference with other authorized operations be terminated by the embassy or chancery, the Board determined that the issue of interference should not be considered by the Board in granting or denying the special exception, because:

- A. The existence of interference resulting from the Benin antenna has yet to be determined, insofar as it has not been constructed or put in place. Even if there is a predetermination that some interference may result from the Benin antenna, the nature and extent of such interference, and what can be done to abate or minimize such interference is unknown. Moreover, it would be impossible to measure at this point, the interference which would be caused by the Benin antenna, and interference caused by other authorized operations in the same area such as a ham operator or transmissions from the Swiss Embassy. Consequently, the BZA has insufficient facts, as distinct from speculation, that the antenna will, in fact, cause such interference to adversely affect the community.
- B. The burden to relieve any possible interference does not rest solely with the foreign government. Property owners do have some responsibility to minimize interference they may receive. The allocation of responsibility, however, can only be determined once the antenna is up and is

transmitting. It is the Board's understanding from the State Department that if a particular property owner experienced such interference and a complaint was filed with the State Department or NTIA, the State Department would have an obligation to investigate the complaint to determine whether there was any improper transmission by the embassy or chancery. If fault was determined, the embassy or chancery could be required to terminate such improper transmission. If the transmission was found to be within the allowable range of interference allowed under Federal regulation, then the State Department would have an affirmative duty to assist in reaching some compromised resolution between the distressed property owner and the embassy or chancery. With Federal regulations in place to address the problem of interference, and given so many unknowns about injury or disruption which would be caused by the Benin antenna, the issue is not an appropriate consideration for determining whether there will be any adverse affect on the Woodley Park community.

There has also been some question whether BZA approval is required on structures under forty feet in height. This issue is irrelevant insofar as the Zoning Administrator did not base his action on any height limitation. Even so, Paragraph 3101.476 provides that if the structure is in excess of forty feet, it "must be approved by the Commissioners of the District of Columbia." The Board construes this provision to set forth an additional requirement of the applicant if the height is over forty feet, not that the BZA only has jurisdiction to consider structures over forty feet.

Based on the findings of fact and the evidence of record, the Board therefore concludes that what is before the Board is exclusively an application for a special exception. The granting of that special exception requires that the proposal meet the requirements of Paragraph 3101.47 of the Zoning Regulations and that, pursuant to Sub-section 8207.2, the requested relief can be granted as in harmony with the general purpose and intent of the Zoning Regulations and the relief will not tend to affect adversely the use of neighboring property.

The Board concludes that the applicant has not met its burden of proof. The proposed antenna tower would affect adversely the use of neighboring property. The proposal would be visually intrusive on the residential character of the neighborhood. The Board further concludes that additionally, the proposal would have an adverse affect on the value of neighboring property. The antenna would be clearly visible from Cathedral Avenue and would constitute an



unsightly visible intrusion for residents living to the south of the Chancery across Cathedral Avenue, as well as for the residents of the apartment buildings to the east and north of the Chancery. The residences directly west of the Chancery would be especially affected as they have third floor bedroom and second floor kitchen and living room windows facing the proposed antenna site. In addition, these residences have second floor balconies which would be directly facing the proposed antenna. The antenna would constitute an adverse visual impact from all directions. The existing landscaping only partially screens the view from some directions. Because the tower would be thirty-eight feet high, it would be many years, if ever, before any new landscaping provided would be tall enough to provide an effective screen. Prospective home purchasers would be deterred from buying residences in the immediate area of the proposed tower, and property values would be diminished.


The Board further concludes that the construction of the proposed tower would constitute an attractive nuisance to the children of the neighborhood and would have a further adverse affect. The proposed tower is constructed like a "step-ladder" and is intended to be easy to climb. Even young children could climb it, and there is no foolproof way to make it inaccessible to children. Exposure to the antenna could result in burns. Many young children reside in Woodley Park and the Maret School, with grades one through twelve, is only two blocks from the Chancery site. The construction of a six foot fence would be insufficient to prevent children from gaining access to the yard.

The Board further concludes that it has accorded to the ANC the "great weight" to which it is entitled under the statute. Accordingly, for the above reasons, it is ORDERED that the application is DENIED.

VOTE: 4-0 (Maybelle T. Bennett, Carrie L. Thornhill, Charles R. Norris and William F. McIntosh to deny, Douglas J. Patton not voting, not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:

  
STEVEN E. SHER  
Executive Director

FINAL DATE OF ORDER:

24 JUL 1985

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

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